Midwest Television, Inc., d/b/a KFMB Stations *and* Harry Clement. Case 21–CA–32858

November 23, 2004

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On May 4, 2001, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, the General Counsel and the Respondent filed answering briefs, and the Respondent filed a reply brief to the General Counsel's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] only to the extent consistent with this Decision and Order.

We agree with the judge, contrary to our dissenting colleague, that the Respondent did not violate Section 8(a)(5) of the Act either by reducing employee Harry Clement's above-scale salary to the contractual rate or by insisting to impasse on a permissive subject of bargaining. For the reasons stated below, we find merit in the Respondent's exceptions to the judge's further findings that the Respondent violated Section 8(a)(1) of the Act by soliciting the decertification of the Union and violated Section 8(a)(3) by reducing Clement's wages to union scale and by constructively discharging Clement based on his pay reduction. Accordingly, we reverse the violations found by the judge and dismiss the instant complaint.

I. THE "CLOSELY RELATED" ISSUE

The judge found that the Respondent violated Section 8(a)(1) when its president, Edward Trimble, solicited Clement in February 1998 to initiate the Union's decertification. The Respondent argues that this solicitation allegation is time barred by Section 10(b) of the Act because it is neither contained in Clement's unfair labor practice charge nor closely related to any allegations contained in that charge. We agree.

On July 15, 1998, Clement filed his original charge alleging that the Respondent violated Section 8(a)(3) of the Act by "unlawfully reducing [his] compensation" and by constructively discharging him. Clement filed his first amended charge on July 27, 1999, alleging that the Respondent's treatment of him and its conduct during bargaining violated Section 8(a)(3) and (5). Neither the original charge nor the first amended charged included any independent 8(a)(1) allegation. Nonetheless, the complaint specifically alleged that the Respondent violated Section 8(a)(1) by soliciting employees to resign from the Union.

In *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988), reaffirmed in *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989), the Board set forth the following three factors for determining whether allegations that would otherwise be untimely can be included in a complaint based on their close relationship to the allegations in a timely filed charge: (1) whether the untimely allegation involves the same legal theory as the allegation in the timely charge; (2) whether the allegations arise from the same factual situation or sequence of events; and (3) whether the respondent would raise similar defenses to both allegations. The allegation relating to Trimble's solicitation does not involve the same legal theory as the allegations in the charge and amended charge. Clement's charge and amended charge allege violations of different sections of the Act and are based on different legal theories than Trimble's alleged 8(a)(1) solicitation. The factual situations are also distinct. The 8(a)(5) allegations in the charge concern the Respondent's conduct during contract negotiations, while the 8(a)(3) charge allegation relates to Respondent's treatment of Clement in reducing his wages. By contrast, the complaint allegation involves

[1] The Respondent's request for oral argument is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We agree with the judge's finding that the Union's withdrawal of its 8(a)(5) charges, pursuant to a non-Board settlement with the Respondent, did not preclude the Board from proceeding on the Sec. 8(a)(3) and (5) charge Clement subsequently filed in this case. In adopting, we rely on *Auto Bus, Inc.*, 293 NLRB 855, 856 (1989), in which the Board reaffirmed its policy that where, pursuant to a non-Board settlement, unfair labor practice charges are withdrawn with the Regional Director's approval, the Regional Director is not estopped "from proceeding on any new charges alleging the same conduct as the withdrawn charges." (Footnote omitted.) We stress that the Regional Director did not sign or approve the non-Board settlement agreement, which was a private matter between the parties. See *Quinn Co.*, 273 NLRB 795 (1984), cited in *Auto Bus,* supra. In any event, Clement himself was not a party to that settlement. We further note that the judge's citation to *Independent Stave Co.*, 287 NLRB 740, 743 (1987), in discussing this issue is inapposite. In *Independent Stave*, the issue presented was whether the Board would grant a party's Motion for Summary Judgment on unfair labor practice charges in deference to a non-Board settlement agreement. The case did not address whether a Regional Director's approval of a non-Board settlement would preclude the Regional Director from proceeding on new charges, filed by an individual who was not a party to the non-Board settlement, based on the same underlying conduct.

whether conduct relating to efforts to decertify the Union interfered with employee Section 7 rights in violation of Section 8(a)(1). Finally, the Respondent's defense of this complaint allegation would require it to raise different arguments (that is, whether certain conduct occurred and whether it tended to interfere with employee rights) from those involved in defending against allegations in the charge and amended charge relating to its duty to bargain and refrain from discrimination, with consideration of motivation.

We, therefore, conclude that the complaint allegation that the Respondent violated Section 8(a)(1) by soliciting the Union's decertification does not meet the *Redd-I* test. Thus, Section 10(b) precludes the Board from considering this issue.[4]

II. THE 8(A)(3) ALLEGATIONS

A. Facts

The Respondent and the Union have been parties to a series of collective-bargaining agreements covering all the Respondent's on-air television and radio personalities for over 50 years. The most recent collective-bargaining agreements were effective from February 1, 1994, through January 31, 1997,[5] and from March 1998 until July 2001. All relevant contracts between the Respondent and the Union set forth minimum terms and conditions of employment for the unit employees, but also expressly permitted the Respondent to deal directly with individual employees in negotiating personal service contracts (PSCs) that could provide for wages and/or benefits greater than the contractual minimum.

Clement, a television studio news anchor, worked for the Respondent from October 1979 through February 1998. His most recent PSC was effective from July 17, 1994, through January 31, 1998, and provided for annual compensation of $225,000, $235,000, and $250,000, respectively, during each of the 3 years of the contract. As a union member, Clement engaged in various union activities, including attending union meetings and a late 1997 bargaining session.

Upon expiration of the 1994–1997 agreement, the Union withdrew permission for the Respondent to deal directly "with new bargaining unit employees or current employees not signed to a . . . PSC." The Union was attempting to exert pressure on the Respondent to agree to a successor contract by eliminating the Respondent's ability to hire and retain experienced on-air talent. By letter dated March 17, 1997,[6] the Respondent informed the Union that it intended to declare a bargaining impasse unless the Union accepted its final offer by March 24. The Respondent claimed that the Union's refusal to allow it to negotiate PSCs was "without precedent in our industry and we believe that this negotiating ploy will backfire against [the Union] and cause discontent among your members." In response, the Union notified the Respondent that it would allow the Respondent to "direct deal" with any of its current employees whose PSC negotiations began before March 6.

After the Respondent implemented its final offer on April 6, the Union filed an unfair labor practice charge against the Respondent alleging 8(a)(5) violations. By letter dated May 29, the Respondent informed the Union that, "in accordance with your restrictions, those employees who currently have [PSCs] will be adjusted to scale upon the expiration of their [PSCs]."

In late September or early October, Clement discussed with the Respondent's news director, Fred D'Ambrosi, possible terms for a new PSC to replace Clement's contract expiring in January 1998. Clement made a written proposal seeking annual salary figures of $300,000, $315,000, and $330,000, respectively, for a new 3-year PSC. Clement also requested that the PSC provide an annual clothing allowance of $3500, and relieve himself of working Thanksgiving, Christmas, or early morning shifts, as well as taking any helicopter rides. D'Ambrosi replied that the Respondent's president, Trimble, would have to approve it. The next day, Trimble told Clement that it "looks like we have a deal." On October 14, the Respondent's attorney prepared a new PSC for Clement, who rejected it because the agreement did not include either the clothing allowance or the other restrictions described above. D'Ambrosi claimed that he had forgotten to mention these items to Trimble. On October 29, the Respondent informed the Union that, based on the Union's opposition to its direct dealing with prospective new hires, the Respondent would not directly negotiate any new PSCs or other above-scale compensation with existing employees. The Respondent subsequently told the Union, on November 3, that it had rejected Clement's counteroffer to its PSC proposal and that its own PSC proposal was no longer open for Clement's acceptance. On November 14, Trimble told Clement that the Respondent had decided to eliminate direct dealing because of the union negotiations.

Meanwhile, in September 1997, the Respondent reached agreement with television reporters Kathy Chin and Colleen Rudy on successor PSCs. Both Chin and

[4] See generally *Chariot Marine Fabricators Corp.*, 335 NLRB 339, 342–343 (2001).

[5] By mutual agreement, the parties extended this contract until February 28, 1997.

[6] All dates are in 1997, unless otherwise noted.

Rudy subsequently claimed that the Respondent had made errors in calculating the annual salaries set forth in their respective multiyear agreements based on cost-of-living raises provided for by the then-existing collective-bargaining agreement. After reviewing Chin's and Rudy's assertions, D'Ambrosi agreed with the employees and made the appropriate changes. The Respondent signed the final PSCs for both Chin and Rudy after it decided that it would no longer enter into such agreements pending the outcome of negotiations.

D'Ambrosi testified that, about this time, a television reporter named Kevin Cox tentatively agreed to a new PSC. The Respondent then announced that it would no longer negotiate PSCs before Cox returned the signed copy. When Cox subsequently questioned D'Ambrosi about one of its terms, D'Ambrosi said that Cox would have to wait until after the Respondent resolved the union issues if he wanted to change anything. Cox executed the PSC without any changes. Although not discussed by the judge, D'Ambrosi also testified that, during this period, he had a discussion with the agent for employee Ronnie Loaiza about the renewal of her PSC. D'Ambrosi said that the Respondent did not renew Loaiza's contract because Trimble told him the Respondent was discontinuing PSC negotiations for all employees until there was a new collective-bargaining agreement.

On December 8, the Union gave the Respondent permission to negotiate PSCs with both new and existing employees. The Respondent asked the Union, on December 9, whether it would agree not to revoke permission for the Respondent to deal directly with employees in the future and to withdraw its unfair labor practice charges. That same day, the Union declined to withdraw its Board charges and indicated that it had no intention of withdrawing PSC authority, but was "not willing to state that sometime in the distant future, we will never withdraw that permission." On December 12, the Respondent claimed that the Union's gesture of goodwill was meaningless so long as the Union retained the power to withdraw PSC authority. The Respondent also informed the Union that, unless the parties agreed on a new contract or reached a bargaining impasse: "[A]ll employees who have Personal Service Contracts will be lowered to scale upon the expiration of their Personal Service Contract."

On January 15, 1998,[7] the Respondent notified Clement that his salary would be reduced to scale (about $52,000) on expiration of his PSC on January 31. On January 23, the Respondent reiterated to the Union its intention to reduce the salaries of Clement and 19 other employees, who did not have PSCs, to union scale. Thereafter, the Respondent reduced Clement's salary to scale on February 1. After telling Trimble that he could not afford to work for the Respondent at union scale, Clement submitted his resignation on February 19. On February 24, Clement began working under a 2-year contract for another television station.

On March 1, the Respondent reduced to scale the salaries of the 19 employees who were working for above-scale compensation without individual PSCs.

The Respondent and the Union subsequently agreed to a new 3-year collective-bargaining agreement on March 20. The Respondent offered to reinstate Clement at his former above-scale salary, but Clement declined based on his PSC with the new employer.

B. Judge's Decision

The judge found that the Respondent violated Section 8(a)(3) by reducing Clement's salary, by engaging in conduct inherently destructive of the Act when it reduced Clement's pay, and by constructively discharging Clement. Because Clement was a high-profile employee as a television news anchor, the judge agreed with the General Counsel's assertion that the Respondent was sending "a message to all bargaining unit employees designed to chill union support and thereby engaged in conduct inherently destructive of employee rights." She found that Clement was treated disparately from employees Chin, Rudy, and Cox, whose PSCs the Respondent finalized at the same time that it ceased negotiations with Clement. While noting that no evidence existed to establish that the Respondent discriminated against Clement because of his individual union activities, the judge nonetheless concluded that the Respondent was not free to single out Clement as an example to bring pressure on the Union. She concluded that the Respondent's treatment of Clement was inherently destructive of the Act under *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967), and, thus, violated Section 8(a)(3) because it had a "far reaching effect" hindering future collective bargaining and created the impression in the minds of employees that collective bargaining was an act of futility. Finally, the judge concluded that the Respondent's reduction of Clement's salary to scale amounted to his constructive discharge, in violation of Section 8(a)(3).

C. Discussion

Contrary to the judge, we do not find that the Respondent violated Section 8(a)(3) by reducing Clement's pay to union scale, or that it constructively discharged him. The resolution of these issues turns on the employer's motivation. To prove a violation of Section 8(a)(3) and

[7] All subsequent dates are in 1998, unless otherwise noted.

(1) under our decision in *Wright Line*,[8] the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a substantial or motivating factor in the employer's adverse action.[9] Thus, the General Counsel must offer evidence that the employer was aware of the employee's protected activity, and that animus against the protected activity motivated the employer's alleged discrimination.[10] Once the General Counsel makes a showing of discriminatory motivation by proving the employee's prounion activity, employer knowledge of the prounion activity, and animus against the employee's protected conduct, the burden "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra, 251 NLRB at 1089.[11]

In this case, we find that the General Counsel has failed to meet the initial burden of demonstrating that the Respondent's alleged discrimination was motivated by Clement's Section 7 activities. The record shows that, although Clement was a union member and attended union meetings, he did not engage in any union activities beyond general membership participation. Indeed, there is evidence that Clement tried to decertify the Union after the Respondent reduced his salary. Thus, even accepting the judge's finding that the Respondent was making an example of Clement as a highly paid news anchor, nothing in this case links the Respondent's adverse action in reducing his pay to Clement's union or other Section 7 activity. Simply put, the General Counsel has failed to establish any connection between the reduction in Clement's pay and his union activity.

Furthermore, we disagree with the judge's finding that the General Counsel has established animus here by showing that the Respondent subjected Clement to disparate treatment in this case. In finding such animus, the judge relied in part on the evidence that the Respondent executed PSCs with employees Rudy and Chin after it informed the Union, on October 26, that it would not negotiate any new PSCs or other above-scale compensation with existing employees. We find that the timing of events relating to their new PSCs was different than the circumstances of the Respondent's negotiations with Clement. The evidence shows that the negotiations with Rudy and Chin concluded in September before the Respondent ceased dealing directly with employees. Although the Respondent subsequently corrected arithmetical mistakes in the annual cost-of-living adjustments set forth in both employees' contracts, these changes did not constitute additional negotiations between the parties. Rather, they simply provided an accurate reflection of the agreement the parties had already reached. By contrast, in Clement's situation, the parties had not reached agreement on the final terms of his PSC. Because Clement did not accept the Respondent's contract offer of October 14, Trimble's comment on the Respondent's behalf, that it "looks like we have a deal," proved to be erroneous. Clement instead made a counterproposal that included his demands for an annual clothing allowance and restrictions on performing certain duties. It does not appear that the Respondent's failure to include these items in Clement's PSC renewal was simply an inadvertent mistake because D'Ambrosi admitted that he had failed to mention to Trimble, the station manager, the additional items desired by Clement. Nonetheless, we conclude on these facts that the General Counsel has not sufficiently demonstrated animus.

Regarding negotiations with employee Cox, we reject the judge's finding that the Respondent afforded him more favorable treatment than Clement received. There is scant evidence as to the precise timing of the Cox negotiations, but it appears that the Respondent offered this employee a new PSC before the date that it terminated all such negotiations. By the time Cox raised questions about certain terms of the agreement, the Respondent's ban on PSC negotiations had gone into effect and D'Ambrosi warned Cox that any alteration in the terms of the Respondent's proposal would foreclose execution of the agreement. Contrary to the judge's finding, the Respondent could not have given Clement a similar warning about the consequences of seeking additional individual benefits because the Respondent had not yet implemented its ban on direct dealing with employees. We find that the timing and sequence of events, and not disparate treatment, distinguish the Respondent's treatment of employees Cox and Clement. The evidence that the Respondent refused to negotiate a new PSC with employee Loaiza also supports our finding regarding the General Counsel's failure of proof on this issue.

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[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[9] *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996).

[10] *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993).

[11] Regarding the *Wright Line* analysis, Member Schaumber notes that the General Counsel's initial burden of showing discriminatory motivation involves proving the employee's union activity, employer knowledge of the union activity, and animus against the employee's protected conduct. The Board and circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as a fourth element**,** what is otherwise inferred under the *Wright Line* analysis, the necessity for there to be a causal nexus between the union animus (i.e., Sec. 7 animus) and the adverse employment action. See, e.g., *American Gardens Management Co.,* 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), Member Schaumber agrees with this addition to the formulation.

For these reasons, we conclude that the examples of purported disparate treatment the General Counsel presented do not establish that any discrimination occurred when the Respondent reduced Clement's salary to union scale on February 1. We also stress that the record discloses that his PSC was the first such agreement to expire after the Respondent imposed its prohibition on direct dealing with employees. Further, only 1 month later, as the Respondent had indicated it would, the Respondent reduced to scale the wages of 19 other employees who were working without individual PSCs. It is clear that the Respondent could not have legitimately reduced the salaries of other employees working for above-scale wages until the expiration dates of their respective PSCs.

Contrary to the judge, we also do not find that the reduction in Clement's salary to union scale was inherently destructive of the Act. Section 8(a)(3) has two basic elements: (1) discrimination and (2) motive to discourage or encourage union activity. In *NLRB v. Great Dane Trailers*, supra, the Supreme Court set forth guidelines for assessing employer motivation in the context of asserted 8(a)(3) violations where discrimination was shown. Specifically, the Court explained that there are two categories of discriminatory conduct which, depending on the nature of their impact on employee rights, require a different analysis in assessing employer motivation. Under this framework, if an action is deemed inherently destructive of employee rights, antiunion motivation is inferred and the conduct may be found unlawful, whether or not such conduct was based on business considerations. However, if the action is deemed to have only a comparatively slight impact on employee rights, an affirmative showing of antiunion motive must be made to sustain a violation, if the employer has first come forward with evidence of a legitimate and substantial business justification for its conduct. 388 U.S. at 34.

Based on the General Counsel's failure to establish discrimination here, as discussed above, it is unnecessary to analyze this case in terms of the Court's discussion of conduct that is "inherently destructive" versus conduct that has only a "comparatively slight" impact on employee rights. Nonetheless, even assuming, without deciding, that the Respondent subjected Clement to disparate treatment in reducing his salary, we reject the judge's finding that the Respondent's conduct was inherently destructive because it was likely to have far reaching effects and discourage collective bargaining by making it seem like an exercise in futility. It is clear that the Respondent's strategy in reducing Clement's pay was only a temporary one, in effect only until the Respondent reached a new contract with the Union. Furthermore, contrary to the judge's reasoning, the Respondent's bargaining strategy, similar to the Union's, was not designed to demonstrate the futility of bargaining, but rather to pressure the Union into agreement on a new contract containing the direct dealing provision that both sides knew was indispensable to their interests. We, therefore, conclude that the Respondent's treatment of Clement had at most a "comparatively slight" impact on employee Section 7 rights, under the second element of the *Great Dane* test, and that it was outweighed by the Respondent's need to operate its business.[12] In sum, we find that the Respondent's treatment of Clement was neither discriminatory nor "inherently destructive" of employee rights under Section 7 of the Act.

For these reasons, we find that the Respondent's reduction in the salaries of Clement and 19 other employees constituted a legitimate bargaining tactic that did not violate Section 8(a)(3) in any respect. Because the Respondent's treatment of Clement was lawful, it follows that the Respondent could not have constructively discharged him by reducing his salary. Accordingly, we dismiss the Section 8(a)(3) allegations of the complaint in their entirety.

III. THE 8(A)(5) ALLEGATIONS

Board precedent establishes, as the dissent concedes, that an employer's right to deal directly with unit employees and establish above-scale wages is a permissive subject of collective bargaining.[13] Here, the parties' expired collective-bargaining agreement explicitly authorized the Respondent to deal directly with the unit employees and negotiate PSCs providing for above-scale wages. We agree with the judge that during negotiations for a successor agreement, both sides possessed the right to make contract proposals relating to the subject of direct dealing. Nonetheless, as the judge found, these proposals remained permissive subjects of bargaining and no party could lawfully insist to impasse on their inclusion in the final agreement.[14] In *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 183–186 (1971), the Supreme Court specifically held that parties to a collective-bargaining agreement can unilaterally rescind permissive terms of the contract at any time without violating Section 8(a)(5) of the Act. It follows that, by reducing Clement's salary to scale on the expiration of his PSC in early 1998, the Respondent's action

[12] See generally *Walton & Co.*, 334 NLRB 780, 784 (2001) (discrimination that has a "comparatively slight" impact on employees' Sec. 7 rights is not *inherently destructive* of such rights).

[13] *KJEO-TV*, 324 NLRB 138, 143–144 (1997), enfd. 172 F.3d 660 (1999).

[14] *Taft Broadcasting Co.*, 274 NLRB 260, 261 (1985).

constituted a lawful modification of permissive contract terms under *Pittsburgh Plate Glass,* supra.[15]

We further conclude, for the reasons stated by the judge, that the Respondent also did not violate Section 8(a)(5) by insisting to impasse on retaining the permissive right to deal directly with the unit employees regarding above-scale wages. As the judge found, the Union's effort to restrict the Respondent's right to pay above-scale wages to new employees during contract negotiations, and the Respondent's conduct in reducing Clement's pay to scale, constituted lawful economic pressure utilized by both sides as each attempted to achieve a favorable contractual agreement or to reach a bargaining impasse. Both the Respondent and the Union sought to include a permissive clause in their final agreement permitting the Respondent's continued direct dealing with selected employees.

Reaching a contrary result, the dissent mistakenly confuses the *process* of setting above-scale wages through direct dealing, a permissive subject, with the actual wage rates themselves, a mandatory subject of bargaining. The provision permitting negotiation of higher rates through dealing direct is merely a permissive subject, which either party may rescind at any time. Our colleague relies on cases, including *Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959), and *Technicolor Government Services v. NLRB*, 739 F.2d 323 (8th Cir. 1984), enfg. 268 NLRB 258 (1983), for his position that certain contractual provisions affecting the entire bargaining unit have such a direct impact on the unit employees' wages that they constitute mandatory subjects of bargaining. Those cases, however, are distinguishable. Both the contractual lease restrictions on truckdrivers in *Teamsters Local 24 v. Oliver,* supra, and the employer's change in policy in *Technicolor Government Services,* supra (which diminished the use of leadmen earning higher contractual wages), were found to constitute, in effect, wage setting provisions. Thus, the Board properly found them to be mandatory subjects of bargaining because they had a direct impact on the mandatory subject of unit employees' earnings. Here, the only impact of the Respondent's actions is on the permissive subject of direct dealing to establish above-scale wages. We, therefore, reject the dissent's assertion that Clement's above-scale wages established through direct negotiations automatically became a mandatory subject of bargaining that the Respondent could not unilaterally change upon contract expiration.

In short, the contractual provision permitting the Respondent to negotiate above scale wages directly with selected employees is a permissive subject of bargaining. Our colleague improperly concludes that the relationship between the Respondent's direct dealings and employees' wages transforms the provision allowing such negotiations into a mandatory subject of bargaining. To the contrary, we reiterate that, given the permissive nature of the direct dealing provision, the Respondent had the right under the Act to unilaterally reduce the wages of employees working under PSCs to union scale at any time, during the term of the contract or thereafter, pursuant to *Pittsburgh Plate Glass,* supra. As the judge stated at footnote 29 of his decision**,** that the Respondent reduced Clements' wages under the PSC after discussion or "negotiation" with him did not confer statutory bargaining rights on the employee or alter the permissive nature of the direct dealing.

Thus, contrary to our colleague, we find no merit to the 8(a)(5) allegations of the complaint. We, therefore, dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

MEMBER WALSH, dissenting in part.

The evidence in this proceeding fully supports finding that the Respondent violated Section 8(a)(5) of the Act by unilaterally reducing employee Harry (Hal) Clement's above-scale salary, a wage topic that is a mandatory subject of bargaining. The majority errs in dismissing this complaint allegation.[1]

Section 8(d) of the Act defines the scope of the duty to bargain collectively as encompassing "wages, hours, and other terms and conditions of employment." The Supreme Court established in *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958), that mandatory subjects of bargaining are those designated in Section 8(d). 356 U.S. at 348–349. It is, thus, axiomatic that wages constitute a mandatory subject of bargaining.[2] Nonmandatory or permissive subjects of bargaining are those not involving wages, hours, or other terms and conditions of employment under Section 8(d).

[15] See *Hope Electric Corp.*, 339 NLRB 933 (2003).

[1] I join the majority decision in all other respects, including the dismissal of the allegation that the reduction in Clement's pay violated Sec. 8(a)(3) of the Act. In light of the finding, supra, that Clement was not treated disparately, I find it unnecessary to address—as does the majority in assuming arguendo disparate treatment—the alternative theory that the reduction was inherently destructive of employee rights under *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). The *Great Dane* analysis is inapplicable if the employer conduct did not even have a "comparatively slight" impact on employee rights and would not even "have adversely affected employee rights to some extent." 388 U.S. at 34.

[2] See, e.g., *Columbia University*, 298 NLRB 941 (1990) ("wages are undeniably a mandatory subject of bargaining").

The distinction is of particular significance in this case as it implicates the parties' bargaining obligation upon expiration of their collective-bargaining agreement and—as here—before the parties had instituted a successor agreement. When a collective-bargaining agreement expires, an employer may not alter terms and conditions of employment of the expired contract that involve mandatory subjects until it has bargained to a good-faith impasse over new terms. *NLRB v. Katz*, 369 U.S. 736 (1962). Thus, a "unilateral change of an expired provision on a mandatory topic, such as one involving wages, is an unfair labor practice, as it violates the duty to bargain collectively in good faith." *Silverman v. Major League Baseball Player Relations Committee (MLBPRC)*, 880 F.Supp. 246, 253 (S.D.N.Y. 1995), affd. 67 F.3d 1054 (2d Cir. 1995). That is precisely the violation the Respondent committed here by unilaterally reducing Hal Clement's wages.

The facts, as more fully set forth in the judge's decision, show that the parties' expired collective-bargaining agreement expressly permitted the Respondent to deal directly with individual employees in negotiating personal service contracts (PSC) providing for wages and other benefits greater than the contractual minimum. The record establishes that such a provision for setting wages is critical in the broadcast industry because it permits employers to recruit and retain on-air personnel and others whose marketability far exceeds contractual wage minimums. The Respondent considered news anchorman Hal Clement to be such an employee, and, therefore, it directly negotiated with Clement a PSC containing a wage rate far exceeding the parties' contract minimum. There is no dispute that the Respondent, after the expiration of the parties' collective-bargaining agreement and while negotiations for a successor agreement were ongoing, unilaterally reduced Clement's wages on February 1, 1998, upon the expiration of Clement's PSC.

The key issue presented is whether wages lawfully established through direct dealing constitute a mandatory subject of bargaining. The judge determined they were not, because direct dealing itself is not a mandatory topic. The judge erred, however, because the issue is not whether direct dealing constitutes a mandatory subject. Rather, the issue is whether Clement's wages, once set though a permissive-subject mechanism, are a mandatory subject of bargaining. As the Board and the courts have found in a variety of contexts, provisions that initially appear to be permissive subjects are nevertheless mandatory subjects because of their close relationship to wages. Thus, Clement's wages must be regarded as mandatory subjects.

For example, in *Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959), the Supreme Court found contractual provisions fixing lease restrictions on truckdrivers to be mandatory subjects even though they did not appear, on their face, to relate directly to terms and conditions of employment. The Court held the restrictions to concern a mandatory bargaining subject because of their direct effect on "the basic wage structure established by the parties' contract." 358 U.S. at 293–294. In *Technicolor Government Services v. NLRB*,[3] the court held that the employer violated the Act by unilaterally changing its policy regarding the use of leadmen. Rejecting the employer's argument that that topic was not mandatory, the court explained that the practice of using leads had become "an integral part of the Company's wage structure" and that the "effect of the change in policy was a reduction in the wages of employees in the bargaining unit." 739 F.2d at 328. Accord: e.g., *Wood v. National Basketball Assn.*, 809 F.2d 954, 962 (2d. Cir. 1987) (constituent parts of collectively-bargained free agency/reserve system deemed mandatory subjects "because of their direct relationship to wages and conditions of employment"); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976) (provision which on its face did not concern mandatory subjects held mandatory because of effect on salaries). The principle established by these cases is that whether a provision concerns a mandatory subject depends not on its form but on its practical effect. *Technicolor Government Services v. NLRB*, supra, 739 F.2d at 328.[4]

Applying this principle here, there can be little doubt regarding the mandatory character of the subject at issue, the directly negotiated wages of Hal Clement. Clement's directly negotiated wages are not merely closely related to wages, they are wages. Indeed, the setting of Clement's wages via direct dealing *is* in effect the collectively bargained wage in the parties' agreement for a key group of employees that includes Clement.[5] The conclusion that directly negotiated wages are a mandatory subject of bargaining is unavoidable. Accordingly, the Respondent violated Section 8(a)(5) by unilaterally changing Clement's wages on February 1, 1998.

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[3] 739 F.2d 323 (8th Cir. 1984), enfg. 268 NLRB 258 (1983).

[4] See also *Regal Cinemas*, 334 NLRB 304, 305 fn. 7 (2001) (an otherwise permissive term may be so intertwined with and inseparable from the mandatory terms and conditions for the contract being negotiated as to take on the characteristics of the mandatory subjects themselves), enfd. 317 F.3d 300 (D.C. Cir. 2003); *Sea Bay Manor Home For Adults*, 253 NLRB 739 (1980) (same), enfd. mem. 685 F.2d 245 (2d Cir. 1982).

[5] The majority errs by failing to focus on the practical effect of the provision at issue, as the case law instructs.

David H. Mori, Esq,. for the General Counsel.
Craig A. Schloss, Esq. and *Rick Bergstrom, Esq. (Morrison & Foerster, L.L.P.),* of San Diego, California, and *Elizabeth Kimmel, Esq.,* for the Respondent.
J. L. O'Donnell Jr., Esq. (O'Donnell & Harrison, L.L.P.), of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This case was tried in San Diego on January 16 through 18, 2001. Harry Clement, an individual, filed the original and first amended charges on July 15, 1998, and July 27, 1999,[1] respectively, against Midwest Television, Inc., d/b/a KFMB Stations (Respondent or KFMB). The complaint was issued September 29, 1999.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the counsel for the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, owns and operates a radio and television station KFMB at its facility in San Diego, California. During the 12-month period ending March 31, a representative period, Respondent derived gross revenues in excess of $100,000, sold time for commercial advertising to advertisers of national brand products, and purchased and received at its San Diego, California facility goods valued in excess of $50,000 from other enterprises located within the State of California, each of which had received the goods directly from points outside the State of California. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent stipulated at the hearing, and I find that the American Federation of Television and Radio Artists Local 225, AFL–CIO (the Union or AFTRA) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Negotiations

Respondent and the Union have had a collective-bargaining relationship for more than 50 years covering all Respondent's on-air personalities in both radio and television.[2] The term of the latest collective-bargaining agreement is March 1998 to July 2001 (the current agreement.) The penultimate agreement between Respondent and the Union was effective February 1, 1994, through January 31, 1997, but was extended by the parties to February 28, 1997 (the 1994–1997 agreement). The alleged unfair labor practices occurred between February 28, 1997, and March.[3]

The present and all past collective-bargaining agreements material hereto between Respondent and the Union have set minimum terms and conditions of employment, including minimum wage rates for unit employees. However, the agreements have expressly given Respondent the right to deal directly with individual employees in arranging personal service contracts (PSCs), which by their terms provide for wages and/or benefits greater than those established by the collective-bargaining agreements. This flexibility to establish wage and benefit packages permits Respondent to recruit and retain on-air personnel whose marketability far exceeds the provisions of the collective-bargaining agreement (talent). At article 7(B) individual contracts (personal services contracts) the 1994–1997 agreement provided:

> Employer agrees that it will not enter into a contract with or employ any bargaining unit employee at wages and working conditions less than those set forth in the Schedules annexed hereto. The Employer shall advise the individual employee of his right to be represented by AFTRA at all such individual negotiations, and AFTRA shall have the right to represent such employees therein . . . no terms, wages or hours in such existing contracts which are more favorable to such employees than those herein specified shall be deemed . . . modified [by the terms of the 1994-[19]97 agreement.]

Thomas Doyle testified that typically when PSCs expire, one of three things happen: the employee is terminated, the employer signs a new PSC, or the employee continues at the old terms and conditions of the PSC but without a guaranteed term of employment. In the case of Respondent, when an employment change was effected for a unit employee, KFMB sent the Union a notice of personnel change showing the employee was being terminated, had signed a new PSC, or had his/her rate of pay changed.[4] Respondent did not always furnish the Union copies of individual PSCs but always sent the Union notification that an employee had signed a PSC, setting out its effective term and wage rate.[5]

Respondent and the Union commenced negotiations for a successor agreement in December 1996. The primary negotiating team for Respondent included Respondent's labor attorney, Craig Schloss (Schloss) and Elizabeth Kimmel. Thomas W. Doyle (Doyle), executive director and in-house counsel repre-

[1] All dates are in 1998 unless otherwise indicated.

[2] The personalities include news reporters and news anchors for the television operations of Respondent, and radio and news personnel of the AM and FM radio operations.

[3] Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

[4] Doyle's later testimony described a fourth option, i.e., that an employee whose PSC was not being renegotiated upon expiration would experience a change in wage rate. If that occurred, the Union was noticed of the reduction through a personnel change notice.

[5] In 1997, the Union requested Respondent to produce copies of all employees' PSCs. Each year the Union requested, and Respondent furnished, the total compensation for each employee during the previous year. Employees also called Doyle to discuss with him items they wanted included in their PSCs or to inform him that Respondent was not going to renew their PSCs or was going to keep them at the same rate of pay.

sented the Union. Negotiations were conducted through meetings and mail and facsimile correspondence.

Respondent sought to obtain modifications to the 1994–1997 agreement that would give it greater flexibility and make it more competitive. Significant to this purpose were a number of economic proposals, including a proposal to eliminate or reduce severance pay. The 1994–1997 agreement provided for severance pay in the event of discharge relative to length of service at a percentage of actual salary. The maximum amount of severance pay was 26 weeks of salary.

Upon the expiration of the 1994–1997 agreement plus its extension, by letter dated March 6, 1997, the Union withdrew permission for Respondent to deal directly "with new bargaining unit employees or current employees not signed to a . . . PSC." [6] The Union's purpose was to bring pressure on Respondent to meet its demands by curtailing Respondent's ability to attract and retain talent. Doyle testified that when an employee's PSC expired, it was common for another radio or TV station to offer that employee a contract, and that the more marketable personalities are paid as much as 50 times over scale. By limiting Respondent to hiring new personalities at scale, the Union was effectively preventing Respondent from hiring experienced talent. Specifically, the Union understood Respondent hoped to bring in a morning team, Jeff and Jerry, from another station. In order to obtain those personalities, Respondent would have had to pay them substantially over scale. If Respondent could not do so, the Union believed Respondent might be more willing to extend the 1994–1997 contract and negotiate a new contract with favorable terms.

Believing that current employees with above-scale compensation or PSCs due to expire would pressure the Union to reverse its position, Respondent took the position that it would not negotiate with any employee if not with new hires. By letter dated March 17, 1997, Respondent sent the Union its final offer and stated, in pertinent part:

> It appears that there are irreconcilable differences in our negotiating positions and unless you accept our proposal on March 24, we intend to declare impasse and unilaterally implement some or all of the final offer.
>
> In reviewing our final offer, please note that because of AFTRA's demand, which we may not legally refuse, we have removed from the contact [sic] KFMB's right to negotiate Personal Service Contracts. As you acknowledged in negotiations, this is without precedent in our industry and we believe that this negotiating ploy will backfire against AFTRA and cause discontent among your members. I cannot emphasize enough how important I think it is to everyone that AFTRA reauthorize KFMB to negotiate with our talent or their agents over pay and other terms of employment.

[6] The written communications between the Union and Respondent show as correspondents either Doyle or Mathis L. Dunn Jr., national assistant executive director (Dunn), for the Union and Schloss, Trimble, or Kimmel for Respondent. Each is an agent of his/her respective principal. There being no reason to specify the individual correspondent, regardless of specific author or recipient, I have designated the parties as "the Union" or "Respondent."

The Union modified its position by letter dated March 27, 1997, and notified Respondent that AFTRA would agree to allow KFMB to "direct deal" with any of its current employees whose negotiations began before March 6, 1997.

On April 6, 1997, Respondent implemented its final offer of April 1, 1997. The Union filed a charge with the Board alleging violations of Section 8(a)(5) and (1) of the Act by Respondent's implementation of its final offer and failure to furnish wage information.

In a letter dated May 29, 1997, Trimble, wrote to Doyle:

> [I]t has been KFMB's regular practice to consider giving raises to its employees at the start of our new fiscal year in June. However, since AFTRA has recently restricted . . . direct dealing. . . . AFTRA has placed us in the position of being unable to grant any wage increases at this time. In addition, in accordance with your restrictions, those employees who currently have Personal Service Contracts will be adjusted to scale upon the expiration of their Personal Service Contracts.

The Union responded by letter of the same date, disclaimed Respondent's construction of the Union's restriction on PSCs, and informed Respondent that although it could not deal directly with any employee hired after February 28, 1997, it could continue to negotiate PSCs with employees hired before then. Employees who did not start at Respondent until after February 28, 1997, could only be paid scale and receive those benefits as set out in the 1994–1997 contract.

The parties did not meet from late March until July 8, 1997. In spite of Respondent's repeated urging for negotiating sessions, the parties met only once in each of the months of July and August 1997. According to Schloss, Respondent wanted to push the Union to reach agreement or, alternatively, reach impasse so Respondent could unilaterally implement needed proposals, including reduced severance pay and long-term sick pay. Respondent filed an unfair labor practice charge against the Union alleging a refusal to bargain in good faith. On August 29, 1997, the Union filed an unfair labor practice charge against Respondent alleging direct dealing with employees.[7] The parties met in negotiations on September 11 and 12, 1997.

By letter dated October 16, 1997, Respondent sent the Union a copy of its "last, best and final offer." Respondent noted it had deleted language proposed on July 8, 1997, under article 8, WAGES, as such was unnecessary given Respondent's "inherent right to adjust employees' above scale wages and other terms of employment which are more favorable than those contained in the collective bargaining agreement, as well as the past practice of making such adjustments and compensating employees above scale." Respondent stated its belief that the parties were at impasse and its intention to implement its final offer on October 26, 1997, with certain exceptions.

By letter dated October 17, 1997, the Union took the position that Respondent had no inherent right to adjust employees'

[7] Although the evidence is not clear, correspondence suggests that in spite of the Union's embargo on PSCs with employees hired after February 28, 1997, Respondent entered into PSCs with employees hired after that date.

above-scale wages and could not deal directly with employees without the permission of the Union. Not only had that permission terminated with the expiration of the 1994–1997 labor agreement, the Union argued, inasmuch as the Union had withdrawn permission for Respondent to direct deal with employees hired after February 28, 1997, any direct dealing with new employees would be an unfair labor practice.

By letter dated October 21, 1997, Respondent notified the Union that in light of its October 17, 1997 letter and its August 29, 1997 unfair labor practice charge, Respondent assumed the Union wanted Respondent to rescind the PSCs of employees who started working after February 28, 1997, and reduce their compensation to scale. Respondent listed the names of 15 employees who would be affected.

By letter dated October 24, 1997, the Union responded:

> AFTRA has never asked or demanded that you "reduce these (over-scale new) employees' compensation and rescind their Personal Services Contracts." We have though, repeatedly demanded that KFMB cease and desist from Direct Dealing with new employees . . . that is still our position, contingent on the fact that KFMB will cease and desist from Direct Dealing with new bargaining unit employees and resolve the pending NLRB charge.[8]

On October 29, 1997, Respondent notified the Union that so long as the Union opposed Respondent's direct dealing with new hires, Respondent would not directly negotiate any new PSCs or above-scale compensation with any employee. Respondent agreed to negotiate with the Union for such employees. Respondent invited the Union to negotiate on behalf of all new hires, stating that Respondent would expect the Union to bargain over all terms and conditions subject to collective bargaining at such time. Respondent explained in a following letter of November 3, 1997, that Respondent needed to understand all of its obligations under the new collective-bargaining agreement before it could commit to any above-scale compensation or new PSCs for unit employees. Hence, if the Union wished to negotiate those terms for unit employees, it should be prepared to discuss all aspects of the collective-bargaining agreement, including matters such as severance pay and health and retirement contributions.

By letter to Respondent dated October 30, 1997, the Union reiterated its position that until a new contract was reached, all unit employees hired after March 1, 1997, should only be paid the minimum scale and benefits outlined in the 1994–1997 agreement. By continuing to restrict Respondent to paying only scale, it was the Union's ongoing intention to inhibit the station's ability to hire experienced talent, which, in turn, would force Respondent to agree to the Union's terms.

By letter dated November 17, 1997, Respondent again notified the Union that it intended to negotiate any new PSCs or above-scale compensation only as part of the contract negotiations as it needed to know what its obligations would be under a new contract. Respondent declined separately to negotiate any new PSC without a new collective-bargaining agreement or the Union's confirmation that the parties were at impasse.

By letter dated November 21, 1997, the Union reiterated its opposition to Respondent's intended method of handling individual PSCs, adding, "As we have stated in the past, AFTRA gives KFMB permission to 'Direct Deal' with any current employee. We are not requiring KFMB to allow us to represent 'current' employees. It is our position that we will be present whenever an individual employee requests us to do so."

By letter dated December 8, 1997, the Union wrote to Respondent "in an effort to 'jump start' negotiations and as a gesture of good will." The Union stated it was giving KFMB the right to "Direct Deal" with all newly hired employees of KFMB, for either over-scale compensation or PSCs. The permission was predicated on KFMB's immediately resuming its "Direct Dealing" with all current employees without the requirement that those negotiations take place at the bargaining table.[9] The letter also stated, "To make it perfectly clear, AFTRA gives the right to KFMB to 'Direct Deal' with all employees, including prospective employees, for over-scale compensation and PSC's [sic]." Schloss testified that upon receipt of the letter, Respondent decided to announce its intention of cutting employees' above-scale pay either when an individual's PSC expired or on March 1 for employees without PSCs.

In a December 9, 1997 letter, Respondent asked the Union whether it would agree not to revoke permission for Respondent to deal directly with any employee in the future and agree to withdraw its unfair labor practice charge regarding direct dealing.

In its response of the same date, the Union stated, "AFTRA has no intention of withdrawing its permission for KFMB to 'Direct Deal' with any prospective, new or current employee. However, we are not willing to state that sometime in the distant future, we will never withdraw that permission." The Union declined to withdraw the NLRB charge. Doyle testified that, following this letter, Respondent told the Union it believed that once the Company had signed PSCs with the key people, the Union would again withdraw its permission to direct deal. The Union disclaimed any such intention.

By letter dated December 12, 1997, Respondent stated that the Union's gesture of goodwill was meaningless so long as it retained the power to withdraw permission for direct dealing at some point in the future. The letter also stated that unless there was either a new contract or acknowledgement of a bona fide impasse in negotiations, which established KFMB's future financial obligations, "[A]ll employees who have Personal Service Contracts will be lowered to scale upon the expiration of their Personal Service Contract." Respondent listed the names of 19 employees, including the Charging Party, Clement, who would be affected on or before February 28, 1998. Schloss testified that Respondent wanted to use pay cuts as an economic weapon to force the Union to agree to Respondent's proposals.

[8] In an October 28, 1997 letter to Respondent, the Union clarified that current employees were those hired by Respondent before and starting work by March 1, 1997.

[9] The Union defined a current employee as a unit employee who started work by March 1, 1997.

By letter dated December 14, 1997,[10] the Union informed Respondent:

> AFTRA will not withdraw its permission for KFMB to "Direct Deal" with any prospective, new or current employee until one of two events takes place: 1) we sign a new Labor Agreement, in which case you no longer need that permission as we will include it in the Labor Agreement; or 2) KFMB declares impasse and implements its "Last, Best & Final Offer", permission will automatically be withdrawn on the date the implementation takes place.

On December 19, 1997, the Union wrote to Respondent, offered modifications to its proposals, and requested that Respondent modify its position.

By letter dated January 15, Respondent notified the Union:

> This is to inform you that effective immediately KFMB will begin direct dealing with all employees in accordance with AFTRA'' permission. This means that KFMB will return to the practice of granting any above-scale compensation with employees separate and apart from the negotiation for a new Collective Bargaining Agreement.
>
> In light of this development, the individual compensation proposals we were waiting for are unnecessary and the Company is now in a position to respond to your most recent proposal. Unfortunately, your proposal is still unacceptable.
>
> The bottom line is that KFMB is not willing to further compromise its position. Our negotiations have gone on for over a year now. Although you may disagree, it is apparent to KFMB that the parties are at impasse.

Respondent enclosed another "last, best and final" offer and stated its intention to implement most of its final offer on February 25. Upon the Union's January 23 inquiry as to when Respondent was going to negotiate with employees over a new PSC or over-scale compensation and what employees should do to initiate the process, Respondent replied on the same date that the Union appeared to be confused, and wrote:

> [I]n accordance with the permission you gave KFMB to direct deal with employees, all AFTRA represented employees have been advised that their compensation is to be reduced to the AFTRA union wage scale. Moreover, KFMB does not intend to negotiate this reduction with any employee, unless AFTRA accepts the Company's final offer, or acknowledges a bonafide impasse *and* grants KFMB the unlimited and indefinite right to direct deal with new hires.
>
> KFMB is taking this action as a result of the extreme stress and uncertainty caused by AFTRA's unwillingness to accept our final offer and filing of numerous unfair labor practice charges with the [NLRB] impeding our right to declare impasse and unilaterally implement parts of our final proposal.
>
> KFMB sincerely regrets having to put its employees in this predicament; however, AFTRA's bargaining tactics have placed the Company in an untenable situation.
>
> [A]s of the expiration of his Personal Service Contract on February 1, 1998, Hal Clement will be lowered to the AFTRA union wage scale. Numerous other employees who do not have Personal Service Contracts will be impacted as of March 1, 1998.[11] All other employees will be reduced to scale upon the expiration of their Personal Service Contract.[12]

In testifying about Respondent's January 23 letter, Schloss said that Respondent asked for an unlimited and indefinite right to direct deal because it was concerned that "if the Union agreed to a new collective bargaining contact, or if they acknowledged impasse, and they hadn't given us the right to direct deal, that they could then—a week, a month, two months later, come back to us and say, now we're not going to let you hire anybody new again . . . and that would made us, again, vulnerable and we didn't want to be in that position." By "unlimited" Respondent meant both current employees and new hires. As to the word "indefinite," Schloss explained Respondent's concern: "that the Union would say, okay, you can direct deal with anybody, like they had before, and then renege on that, and take that right away, even if we had a collective bargaining agreement in place, or if they had acknowledged impasse. Now, yes, they had always proposed in their . . . collective bargaining proposals, the right to continue to direct deal, just like we had in the past . . . but when we were making our final offers, we didn't include that same language because we didn't believe that we could include that in a final offer . . . We thought that was something the Union could give us. But we didn't think that we could put that in a final offer."

Upon a clarification request by the Union, Respondent, on January 26, reiterated "KFMB does not intend to direct deal with employees further prior to the expiration of their Personal Service Contract or March 1, 1998, unless AFTRA accepts KFMB's final offer or acknowledges a bonafide impasse *and* grants KFMB the unrestricted and indefinite right to direct deal with all employees, including new hires."

Respondent thereafter declared impasse and unilaterally implemented its final offer. The final offer included the following provision under section 8, Wages:

> Employer agrees that the minimum terms and conditions which cover the employment of bargaining unit employees are those contained in the Schedules annexed hereto and incorporated herein by this reference. The Employer may adjust individual employee's [sic] above-scale wages or other more favorable terms and conditions than those contained in this Agreement, provided the Employer complies with the minimum terms of this Agreement.[13]

[10] The second page of the letter is dated December 12, 1997.

[11] Clement was the only employee with a PSC due to expire during the period of January 26–31. Nineteen employees earned over-scale pay without PSCs.

[12] By letter of the same date, Respondent noted it had inadvertently given February 25 rather than January 25 as the implementation date. Because of the error, Respondent said it would delay implementation of its final offer until January 30.

[13] Schloss testified that Respondent meant, by that proposal, to reserve an ability to lower employees' wages without going below scale.

As set out in greater detail below, on February 1, Respondent reduced Clement's salary to scale. On February 19, Clement terminated his employment with Respondent.

By letter dated February 27, the Union denied the parties were at impasse and repeated its position that Respondent had a current right to negotiate with any employee in the unit for benefits greater than those in the expired collective-bargaining agreement consistent with past practice. The Union filed unfair labor practice charges with the Board on January 29 and February 10, alleging violations of 8(a)(1) and (5) of the Act by Respondent's threat and later implementation of employee pay reduction because the Union would not accept Respondent's final offer.

On March 1, Respondent reduced the over-scale compensation of employees without existing PSCs to the union wage scale.[14]

In March, Dunn became chief spokesperson for the Union, and a 3-year collective-bargaining agreement was reached in that same month (the 1997–2000 contract) that included a provision allowing direct dealing with employees for over-scale wages and benefits including PSCs. Clement did not participate in the discussions and was not a party to the settlement agreement between the parties. By letter dated March 20, Schloss summarized the agreement, in part, as follows:

> As we agreed, upon ratification of the Agreement, the parties release each other from all claims, grievances and unfair labor practice charges which could be filed based on the conduct of either party to date. In order to effectuate this release, the parties agree to withdraw with prejudice all pending unfair labor practice charges and grievances. . . . Finally, this shall confirm KFMB's intent to reinstate the above scale compensation of those employees lowered to scale on March 1, 1998 and to retract the notice given to all other employees of KFMB's intent to lower their compensation to scale upon expiration of their Personal Service Contract. Also as discussed, KFMB has offered to rehire Hal Clement, reinstate his expired PSC above scale compensation and attempt to negotiate a new contract with him.

As a part of reaching agreement, both parties withdrew all unfair labor practice charges filed with the Board, which withdrawals were approved by the Regional Director.

2. Hal Clement

Respondent employed Clement October 1979 through February 1998, at which time he held the position of studio news anchor under the terms of a PSC. His last PSC was effective July 17, 1994, through January 31 and provided remuneration of $225,000, $235,000, and $250,000, respectively, during each of the 3 years.

Clement was a member of the Union and engaged in various activities supportive of the Union such as attending union meetings with employees, attending a bargaining session in 1997, signing a prounion petition on March 24, 1997, along with 45 other employees, and talking to other employees and management about union negotiations. Clement testified that Fred D'Ambrosi, Respondent's news director (D'Ambrosi), occasionally asked him what was going on with the Union, saying he thought what the Union was doing was wrong. There is no direct evidence that Clement was a stronger union supporter than other employees. Doyle testified that of the 19 people whose over-scale wages were due to be reduced by Respondent's wage reduction plan, there were employees who were equally or more vocally prounion than Clement. Trimble believed that Clement's position "may have had some influence on some of the people." According to D'Ambrosi, Clement was considered an important person in the newsroom and "main talent."

In late September or early October 1997, Clement went to D'Ambrosi and asked if they could talk about a PSC to succeed the one expiring in January. A few days later, D'Ambrosi presented Clement with proposed PSC salary increases for each of the following 3 years. Thereafter, Clement gave D'Ambrosi a written counter proposal requesting, inter alia, a 4-year contract with incremental salary increases of $300,000 to $375,000 over the term of the PSC, a clothing allowance of $3500 per year, a talent fee for radio newscasts, and restrictions against helicopter rides and early morning shifts. According to Clement, D'Ambrosi looked at the proposal and said, "You're not going to get that talent fee."

Clement said that was okay, and D'Ambrosi said he would run the rest by Trimble. Some time later, D'Ambrosi returned to Clement and presented salary figures of $300,000, $315,000, and $330,000, respectively, for a 3-year PSC. Following that, Clement gave D'Ambrosi a paper entitled "Contract Proposal for Hal Clement" setting forth PSC terms that included, inter alia, the salary figures presented by D'Ambrosi, a provision for a clothing allowance, a restriction against working on Thanksgiving and Christmas, regular early morning shifts and helicopter rides. D'Ambrosi said he would run it by Trimble. According to Clement, the following day, Trimble came to Clement, slapped him on the back, shook his hand, and said, "Looks like we have a deal. Congratulations . . . I'm glad we've got it done."

D'Ambrosi testified that he discussed the terms of Clement's proposals with Trimble. However, he said it was never his intention to agree to the proposals concerning helicopter rides or early morning shifts, and he did not then discuss them with Trimble who never saw Clement's written proposals. D'Ambrosi notified Kimmel by memorandum prepared on October 14, 1997, that Clement had agreed to a new PSC and summarized terms for a 3-year contract with a clothing allowance of $3500 per year and notations that Clement's existing 5 weeks of annual vacation were to be preserved but that his auto allowance was not. Kimmel drafted a PSC for Clement. The written PSC given to Clement a few days later did not include any provisions relating to early morning shifts, helicopter rides, or clothing allowance. The PSC stated: "Employee shall receive five weeks' vacation per year (inclusive of the holidays listed below)." There were no holidays listed. According to Clement, the provision shorted him on vacation time.

Clement did not sign the proffered PSC but sent it back with a note entitled "Adjustments to Hal Clement Employment Agreement" that set forth the missing provisions. According to

[14] Presumably, those reductions were relatively minor as employees with significantly high salaries were signatory to PSCs.

D'Ambrosi, he told Clement that he would have to discuss those provisions with Trimble. Trimble testified that D'Ambrosi told him Clement had rejected the PSC drafted by Respondent and wanted additional terms that had been on a second page of a paper Clement had given him. Trimble told D'Ambrosi that he considered the additional terms limited Respondent's ability to make changes down the line with Clement, specifically with regard to the regularly scheduled morning and weekend shifts where Trimble wanted assignment flexibility.

Clement testified that about a week later, D'Ambrosi called Clement into his office. D'Ambrosi said he had some bad news, that Respondent had pulled Clement's PSC off the table because of what was happening with the Union. When Clement protested that he had an agreement with Respondent, D'Ambrosi said he had accidentally forgotten to give Trimble the extra things asked for: the helicopter and Christmas and Thanksgiving provisions. Therefore, Clement's "Adjustments" note was a rejection of Respondent's PSC offer.

By letter dated November 3, 1997, Respondent notified the Union that Clement's counteroffer had been rejected, Respondent's prior offer was no longer open, and any further discussions regarding a PSC for Clement would be conducted with the Union.

Trimble thereafter met with D'Ambrosi and Clement on November 14, 1997. Trimble told Clement that Respondent had decided to eliminate direct dealing with all union employees but that they would be happy to meet with him and Doyle to discuss the PSC as well as other issues related to the bargaining agreement. Clement testified he asked Trimble, "What happened here; I mean, we had a deal." Trimble said that the Union would not let Respondent direct deal with new employees, so Respondent would not direct deal with current employees. In the weeks following, Clement continued to ask D'Ambrosi about obtaining a new PSC, but Respondent did not alter its position.[15]

In September 1997, around the time PSC discussions with Clement took place, Respondent reached agreement with television reporter employees Kathy Chin and Colleen Rudy on the terms of individual PSCs and notified Kimmel to draft the agreements. Thereafter, both Chin and Rudy informed D'Ambrosi that the salary figures in the PSC drafts did not reflect the appropriate level of union scale as agreed. D'Ambrosi confirmed an error had been made. The PSCs for Chin and Rudy were not signed in final until after Respondent decided it would no longer enter into PSCs with employees. However, according to D'Ambrosi, because the delay was due to his error, Respondent accepted their PSCs. The Union received copies of PSCs executed between Respondent and Colleen Rudy and Kathy Chin in November and December 1997, respectively.

At some point in latter 1997, Respondent offered television reporter employee Kevin Cox (Cox) a PSC, to which he tentatively agreed. The agreement draft was thereafter given to him, but he had not yet returned it to D'Ambrosi at the time Trimble announced Respondent would no longer negotiate personal service contracts. When Cox brought the contract back to D'Ambrosi with a question about terms, D'Ambrosi spoke to Trimble and Kimmel about Cox's PSC. D'Ambrosi then told Cox that if anything had to be changed in it, the PSC would have to wait until after the union issues were settled, whereupon Cox signed the PSC without any changes. D'Ambrosi could not say whether Cox signed his PSC before or after Clement was told he could not sign a PSC.

Under cross-examination, D'Ambrosi explained that Clement was not permitted to sign his PSC because he had physically returned it, unsigned, with a list of things he wanted changed. Chin and Rudy, on the other hand, were victims of Respondent's mistakes, while Cox still had his PSC and could have signed it at any time. D'Ambrosi admitted that when Cox questioned one of the terms, D'Ambrosi told him, "If you return it to me, then we'll have to wait until after the Union dispute is resolved." However, Clement's situation was different, D'Ambrosi said, because he returned his contract before the PSC ban was effected with a demand for changes, and while Trimble was still considering the requested changes, the decision not to negotiate PSCs was made. D'Ambrosi said that Clement had ever asked to consummate the deal Respondent was agreeable to.

Trimble testified that D'Ambrosi did not tell him of Clement's additional requests until after he had congratulated Clement, but that he did not consider that to be a mistake by D'Ambrosi. Rather, he understood those items to be conditions Clement hoped to get but which D'Ambrosi neither discussed with Clement nor agreed to. In attempting to justify their different treatment of the four employees, I find Trimble and D'Ambrosi to be making distinctions without true differences. D'Ambrosi made a mistake with regard to Clement's PSC either by not noticing the additional terms Clement requested or by considering them to be insignificant and not presenting them to Trimble. It is true that no complete agreement was reached between Respondent and Clement before the direct dealing ban, as the parties had not arrived at a meeting of minds on all issues. However, the same is true of Chin, Rudy, and Cox's PSCs. D'Ambrosi had made mistakes in the PSCs proffered to Chin and Rudy but rectified them and permitted the two employees to sign corrected PSCs in spite of the ban. Cox was warned that any change to his PSC would prevent its acceptance because of the ban. Dissimilarly, in spite of D'Ambrosi's mistaken understanding of Clement's demands, Respondent made no attempt to rectify the misunderstanding as it did with Chin and Rudy. Further, D'Ambrosi did not warn Clement that urging additional terms to his PSC would prevent its acceptance as he had warned Cox. Further, although Clement's compensation was reduced on January 31, employees without PSCs whose compensation could have been lowered to scale at any time were not reduced until March 1. It is clear that Clement

[15] Evidence was adduced that at about this time D'Ambrosi criticized Clement for certain conduct including being difficult with a producer, punching a wall, throwing a videotape, and referring to Respondent as a dysfunctional family during a promo shoot. A letter was also placed in his file for unauthorized use of company email for union business. There is no evidence that any of Respondent's actions in this regard was motivated by antiunion bias toward Clement or that these circumstances influenced Respondent's position with regard to PSCs.

was treated differently with regard to his PSC and to his compensation than other employees similarly circumstanced.

On December 23, Doyle, Clement, Schloss, and Kimmel met to discuss Cement's PSC. Clement argued that Respondent should honor the agreement it had made with him for the terms of a new PSC. Schloss said that Respondent would only discuss Clement's PSC in the context of a new collective-bargaining agreement. According to Doyle, Schloss said that Respondent would have no response to Clement until the parties had a new collective-bargaining agreement showing total economic liability. Doyle said they were there to talk about a PSC for Clement, not a collective-bargaining agreement and urged Respondent to let him sign a PSC. According to Clement, Schloss said, "If there is an agreement to declare impasse, we will negotiate the old way. If there is no agreement to declare impasse, we will not negotiate with Hal." According to Doyle, Schloss said Respondent would be willing to go back to the old system of negotiating PSCs if the Union acknowledged an impasse existed and agreed to give them the right to direct deal. Schloss asked if the Union would agree to give Respondent the right to direct deal with employees forever. Doyle offered to agree for a specified period of time, but Schloss declined the offer saying that Respondent's offer was the only acceptable agreement.[16]

By letter dated January 15,[17] Respondent notified Clement that upon expiration of his PSC on January 31, his compensation would be reduced to scale, stating:

> Since AFTRA has rejected our final offer, and has filed numerous unfair labor practice charges with the [NLRB] impeding our right to declare impasse and unilaterally adopt parts of our final proposal, we are operating under extreme aggravation and uncertainty. The Union's unwillingness to grant KFMB the unlimited and indefinite right to direct deal and pay above-scale to new hires has created additional frustration.
>
> Until this stalemate is broken, and a final resolution is reached, your compensation will be lowered to the AFTRA Union Wage Scale. If and when the stalemate is broken, there will be no retroactive compensation. . . .

Clement testified that upon receipt of the letter he asked Trimble why Respondent could not continue to pay him at his previous rate even without a new PSC. Trimble said Respondent would not negotiate with anybody because of the union situation.

On January 29, the Union filed an unfair labor practice charge regarding Respondent's threat to reduce employee compensation to scale upon the expiration of individual PSCs.

On February 1, Clement's pay was reduced to scale, $52,000 a year. Trimble testified that the only reason Clement was reduced to scale was because of the strategy being used against the Union, and that his PSC was the first to come up for renewal during this stage of negotiations.[18] Clement was the only employee with a PSC who was reduced to scale in the course of contract negotiations. According to Schloss, the final contract was reached before any other employee's PSC expired. According to Doyle, prior thereto, Respondent never discussed or negotiated with the Union regarding lowering Clement's or any other employee's salary to scale. On February 10, the Union filed an unfair labor practice charge regarding Respondent's reduction of employee wages to scale without bargaining in good faith with the Union.

On February 10,[19] Clement told Trimble that he could not work for the reduced salary. According to Clement, Trimble said, "If we didn't have AFTRA here, there would be no lag time before we went back to business as usual. If we could get half of the members of AFTRA plus one to resign, it wouldn't be here anymore, we wouldn't have problems."

Clement asked, "Well, are you saying that, if AFTRA weren't here, that I would get my contract offered to me?

Trimble said, "Well, the lawyers have told me I have to be really careful in how I phrase this . . . I can't legally promise you that you would get your contract offered to you, but use your common sense." Clement testified that he told Trimble he thought there was sentiment to decertify and he would see what he could do. The next day, Clement began soliciting union resignations from his fellow employees. The number of employees agreeing to do so was far less than 50 percent.

Clement testified that he returned to Trimble and reported failure. He told Trimble, "I've done everything I can possibly do for you to try to get this new contract, what can you do?" Trimble said he could do nothing.

Regarding that meeting, D'Ambrosi testified that Clement came to him and Trimble on February 6, offered to get employees to resign from the Union, and asked if Respondent would then give him a contract.[20] Trimble referred him to the NLRB for decertification information. According to D'Ambrosi, Clement said, "I have my resignation from the Union right here [in my coat pocket]. I will give it to you right now. I just want a contract. Please give me my contract." Trimble told him it didn't work that way. Clement said he would get other people to resign. The managers told him that was up to him.

Trimble also testified about the February 10 meeting with Clement. He said that Clement asked what he could do to get his PSC. Trimble told him that Respondent would not give him a PSC until it had either entered into a new collective-bargaining agreement, agreed to reach impasse, or there was a decertification of the Union. Trimble told him that it was his understanding that if 50 percent of the people wanted to, they could decertify the Union, but he could check with the NLRB. Clement responded, "I think I can get people to decertify."

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[16] According to Doyle, at that time there were quite a few serious differences between the parties over contract issues including severance pay, employee releases, waiver of certain rights in discrimination actions, and overtime.

[17] Clement testified that the typed date was January 14, but the 14 had been lined through and 15 written in.

[18] It is not clear where the expiration dates of Chin's, Rudy's, and Cox's PSCs would have fallen had they not been permitted to sign new PSCs.

[19] The date was identified by Clement as February 10 and by Trimble's memorandum as February 6. The specific date is not crucial, and I have referred to it as February 10.

[20] Although D'Ambrosi used the pronoun "we," in identifying the speaker, he testified that Trimble did most of the talking.

Trimble said, "I am not asking you to do that. Whatever you want to do on your own, is your own."

Clement said, "I think I can get enough signatures over the weekend."

Trimble said, "Hal, that's really up to you."

Clement said, "I know that I can get them at least by Wednesday."

According to Trimble, his recollection of the meeting was memorialized that same day. In part, his memorandum reads:

> [Mr. Clement] asked if I felt that the only way to solve the stalemate was to either get a new AFTRA contract or for the union to no longer exist at KFMB. I responded that the current offer would have to be voted on, and he said he didn't feel that it would be voted in. He asked me what it would take for the union to go away. I responded that over 50 percent of the membership would have to resign from the union and wish not to be represented by them in the future. This could be accomplished by individual letters or a petition. At that time, KFMB would no longer recognize AFTRA's representation. He responded that he felt he could accomplish that by next Wednesday. I once again stated that it was KFMB's desire to compete competitively within our marketplace.

D'Ambrosi testified that following personnel meetings he and Trimble often pool their thoughts or one of them takes notes. The memorandum was prepared after just such a pooling of thought. D'Ambrosi also testified that he probably threw away notes he had taken after the memorandum was written. Although D'Ambrosi testified that Clement was referred to the NLRB, there is no mention of the NLRB in the memorandum. There is also no mention of D'Ambrosi having been present.

Trimble acknowledged that his February 6 file memorandum did not mention the NLRB or his statement that union agreement, impasse, or decertification would permit PSC negotiations. Trimble said he just didn't include that information for some reason.

After considering the manner and demeanor of all witnesses to this conversation along with the discrepancies between Trimble's testimony and the memorandum, I am persuaded that Clement's testimony is credible, and I accept his version of the February 10 meeting.

On February 17, Clement wrote to Trimble informing him he could no longer afford to work for Respondent and that if he did not hear from Trimble by noon on February 19, he would assume that nothing could be done. On February 19, having heard nothing, Clement informed Trimble by letter that he would not be reporting to the station effective immediately. Later that day, Clement found a note on his desk asking him to see Trimble and D'Ambrosi. When he complied, Trimble told Clement he did not want it to come to this. Clement said he did not see a light at the end of the tunnel. Trimble said the union thing was tying Respondent's hands. Clement ceased working for Respondent that day. Thereafter, on February 20, he began employment with DGTB Television in San Diego as a field anchor and signed a PSC with that employer on February 24 for a 2-year period with a yearly salary of $100,000 and $110,000, respectively.

Following agreement on the 1997–2000 contract in March, Dunn telephoned Clement and informed him that Respondent intended to offer to reinstate his existing over-scale salary and discuss a new PSC with him. Clement replied that Respondent knew he was under a contractual obligation with another station.

Clement received a letter dated April 6 from Steven J. Sorensen, resident officer of Region 21, informing him of the parties' tendered withdrawal of unfair labor practice charges and the Region's intended approval. The letter explained both Clement's right individually to file a charge and the time limitations under Section 10(b) of the Act. On July 15, Clement filed a charge in Case 21–CA–32858 with the NLRB, alleging Respondent had violated Section 8(a)(1) and (3) by reducing his compensation to union scale at a time when a genuine impasse in negotiations did not exist and thereby constructively discharging him. Service was effected on July 16, 1998. On July 27, 1999, Clement filed a first amended charge in Case 21–CA–32858, adding the additional allegations that Respondent had violated Section 8(a)(1) and (5) by seeking to declare impasse on a permissive subject of bargaining and unilaterally reducing employees' wages to union scale when a bona fide impasse in negotiations did not exist, and Section 8(a)(1) and (3) by engaging in "inherently destructive" conduct by reducing Clement's compensation and constructively discharging him. The first amended charge was served on Respondent on July 28, 1999.

B. Analysis and Conclusions

1. The Charging Party's standing to file charges under Section 8(a)(5) of the Act

As a general principle, a charge may be filed by a labor organization, an employee, an employer, or any other entity. *Apex Investigation & Security Co.,* 302 NLRB 815, 818 (1991); *Vee Cee Provisions,* 256 NLRB 758 (1981), enfd. mem. 688 F.2d 827 (3d Cir. 1982). Respondent, citing various NLRB Division of Advice memoranda, contends that where the Union has reached settlement with Respondent on terms of a new collective-bargaining agreement and has withdrawn its allegations of 8(a)(5) violations, an individual may not reassert them. Respondent argues that by its March withdrawal of all charges against Respondent, the Union waived Clement's right to allege violations of the Act arising from the negotiations. Respondent further argues that because Clement's 8(a)(1) and (3) allegations are rooted in the alleged 8(a)(5) violations they are equally without foundation.[21]

In arguing that the Union waived Clement's right to file charges, Respondent cites Advice memoranda involving grievances. It is true that in certain circumstances, a union may waive employees' statutory rights,[22] and the Board has granted deference to non-Board settlements between unions and em-

[21] Advice memoranda from the General Counsel do not constitute precedential authority and are not binding on the Board. *Fun Striders, Inc.*, 250 NLRB 520 (1980). Unfortunately, Respondent neither explicates the fact situations posed in the memoranda nor cites underlying case authority.

[22] *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983).

ployers over grievants' objections where proceedings are fair and regular, all parties have agreed to be bound, and the settlement agreement is not clearly repugnant to the purposes and policies of the Act. *Alpha Beta Co.,* 273 NLRB 1546 (1985). Here, no grievance existed regarding Respondent's conduct toward Clement. Further, as Clement did not participate in any discussions leading to the contract settlement; his consent to be bound was neither explicitly nor implicitly obtained,[23] and the settlement did not contain any waiver of Clement's right to seek a remedy with the Board. The authority cited by Respondent is therefore inapposite.

The Board has a policy of encouraging nonlitigious settlement of labor disputes, *NLRB v. Electrical Workers Local Union 112,* 992 F.2d 990, 992 (9th Cir. 1993), but it is not required to approve or defer to all such agreements. Counsel for the General Counsel asserts that the parties' contract settlement does not comport with Board requirements for deferral to a non-Board settlement set forth in *Independent Stave Co.,* 287 NLRB 740 (1987), which, in pertinent part, requires examination of the following factors:

> (1) whether the charging party(ies), the respondent(s) and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in the litigation; (3) whether there has been any fraud, coercion or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practices.

The third and fourth factors of *Independent Stave Co.,* supra, are absent in this case. Whether the second factor—the reasonableness of the settlement—is met is a closer question. The wages of those employees reduced to scale on March 1 were reinstated by the agreement, but there is no mention of any make-whole remedy. No notice to employees was contemplated, and no assurance was given that the employer conduct would not be repeated. A settlement need not remedy all alleged violations, but remedy of alleged injury to employee rights is a significant consideration. See *Flint Iceland Arenas,* 325 NLRB 318 (1998). Here, although employee rights allegedly abrogated by Respondent's reduction of wages were addressed by the settlement agreement, a full remedy was not effected. Clement's situation was considered, but while Respondent offered to rehire Clement, reinstate his expired PSC compensation, and attempt to negotiate a new PSC with him, there was no agreement to compensate him for lost earnings.[24] As to the first factor of *Independent Stave Co.*, there is no dispute that Clement did not agree to be bound by the settlement and that the General Counsel has taken the position that the settlement is no bar to the instant charges. A non-Board settlement agreement providing for withdrawal of charges is a private arrangement that does not preclude the Regional Director from proceeding on new charges alleging the same conduct. *Aratex Services*, 300 NLRB 115 (1990); *Auto Bus, Inc.,* 293 NLRB 855, 856 (1989). I conclude, therefore, that the requirements of *Independent Stave Co.* have not been met and that neither Clement nor the General Counsel is precluded from pursuing the complaint allegations.[25]

2. The 10(b) issues

Respondent, as an affirmative defense, asserted that "some or all of the allegations" herein are time barred by Section 10(b) of the Act.[26] As to the 8(a)(5) charge, Respondent contends that Clement was aware of the alleged violation at least 8 months before the charge was filed and that the 8(a)(3) charge, being derivative, is also untimely. Respondent further contends that Clement's 8(a)(3) allegations are independently untimely as Respondent's intention to lower his pay was communicated to him more than 6 months before his charge was filed.

The Board has long held that only the actual occurrence of an unfair labor practice starts the running of limitations; statements of intent or threat to commit unfair labor practices do not. *Leach Corp.*, 312 NLRB 990, 991 (1993). Further, the 10(b) period commences only when clear and unequivocal notice is given the charging party, and "the burden of showing such clear and unequivocal notice is on the party raising the affirmative defense of Section 10(b)." *Leach Corp.,* supra at 2 (citations omitted); *Chinese American Planning Council,* 307 NLRB 410 (1992). Counsel for the General Counsel persuasively argues that prior to January 31, Respondent had not given Clement unconditional or unequivocal notice that his compensation would be reduced. Until the actual reduction occurred, its fruition was conditioned on the Union's continued refusal to agree to a new collective-bargaining agreement of acknowledge impasse. Therefore, the earliest date at which Clement can be charged with clear knowledge of a possible violation of the Act is January 31, the date his pay was reduced to scale. See *Bryant & Stratton Business Institute,* 321 NLRB 1007 (1996); *Paramount Pictures Corp.,* 276 NLRB 881 (1985).[27] Accordingly, Respondent has failed to meet its burden of showing that Clement had notice of any violation of the Act prior to January 31, the beginning of the 10(b) period, and the complaint allegations are not time barred. The allegations of the amended charge filed July 27, 1999, and served on Respondent July 30, 1999, are also timely as the allegations are

[23] See *Postal Service,* 300 NLRB 196 (1990), where a union was noted to be empowered to bind a grievant apart from individual consent through the contractual grievance procedure.

[24] The Charging Party asserts that Respondent was disingenuous in making such an offer. Certainly Respondent was aware that Clement had signed a PSC with another station and was in no position to accept any PSC with Respondent. However, there is no evidence that Respondent would not have returned Clement to his former status had he been available.

[25] At the hearing, counsel for Respondent moved to dismiss all complaint allegations relating to 8(a)(5) violations on grounds that the settlement between the parties barred the instant 8(a)(5) charges. In light of the conclusions reached herein, the motion is denied.

[26] Sec. 10(b) states in pertinent part that "[N]o complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board."

[27] In light of these findings, I find it unnecessary to determine whether Clement received the letter notifying him of the proposed reduction on January 14 or 15.

"closely related" to those contained in the timely charge. *W. H. Froh, Inc.,* 310 NLRB 384 (1993); *Redd-I, Inc.*, 290 NLRB 1115 (1988).

Paragraph 12 of the complaint alleges that Respondent unlawfully solicited employees to resign from the Union and to seek the resignations of other employees. That allegation is not specifically alleged in either of Clement's charges; however, it is closely related to the timely 8(a)(3) and (1) allegations and was fully litigated at the hearing. *Seton Co.*, 332 NLRB 979 (2000); *Redd-I, Inc.,* supra.[28] Accordingly, I find the unfair labor practices alleged in the complaint are timely.

3. Solicitation of union decertification

When on February 10, Clement told Trimble that he could not work for union scale, Trimble pointed out that if a majority of the employees resigned from the Union, Clement's problems would be immediately cured. Specifically, Trimble said there would be "no lag time" before Respondent returned to "business as usual," and although he could not legally promise Clement he would get his PSC back, he should "use [his] common sense." The thrust of Trimble's statements was to promise immediate relief upon employees' dispossession of the Union. Counsel for the General Counsel asserts that such was a promise of benefit to encourage decertification of the Union. I agree; the statements constituted impermissible instigation of a decertification effort and interfered with employees' exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

While an employer has a right under Section 8(c) of the Act to present employees with an accurate and nonthreatening description of eventualities, e.g., of decertification, it may not grant assistance to employees in decertification efforts or provide more than ministerial aid. *Vic Koenig Chevrolet, Inc.,* 321 NLRB 1255 (1996); *Quinn Co.,* 273 NLRB 795 (1984). Clement did not approach Trimble to ask how to remove the Union as the employees' representative, and there is no evidence that he had any such project in mind. Indeed, Clement had been an active union supporter and had been cautioned by Respondent not to utilize interoffice email for union business. It was Trimble who suggested union rejection as a solution to Clement's problems. Unlawful assistance with a decertification effort includes planting the seed of the decertification concept, helping with wording, typing, etc., and knowingly permitting the activity on worktime. *Exxel-Atmos, Inc.,* 323 NLRB 884 (1997); *Shen Lincoln-Mercury,* 321 NLRB 586 (1996); *Weisser Optical Co.,* 274 NLRB 961 (1985), enfd. 787 F.2d 596 (7th Cir 1986), cert. denied 479 U.S. 826 (1986). Trimble not only planted the seed but also gave no restrictions as to when and how Clement might seek employees' resignations, which, in direct contrast to prior restrictions on email use, constituted clear encouragement and assistance. Moreover, Trimble's assertion that union resignation of an employee majority would result in a return to "business as usual" was a clear promise of benefit to Clement otherwise not immediately available to him. *Voca Corp.*, 329 NLRB 591 (1999). While Respondent's conduct in encouraging union disaffection was not extraordinarily active or prolonged, that "does not negate its unlawful nature." *Rose Printing Co.*, 289 NLRB 252 fn. 3 (1988). Accordingly, I find that Trimble's encouragement of Clement to obtain union resignations or decertification constituted unlawful coercion and encouragement to employees to decertify the Union in violation of Section 8(a)(1).

4. Alleged 8(a)(5) violations

The General Counsel contends that Respondent attempted to force impasse on a permissive subject of bargaining and unilaterally altered its established past practices of continuing the terms of PSCs after their expirations pending individual negotiations and of negotiating for new PSCs after their expirations in violation of Section 8(a)(5) of the Act.

Section 8(d) of the Act provides: "[To] bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Bargaining parties may resort to the use of economic weapons to obtain lawful proposals, and "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *American National Insurance,* 343 U.S. 395, 404 (1952); *Oklahoma Fixture Co.,* 331 NLRB 1116, 1117 (2000). In fact, the Act "does not compel any agreement whatsoever between employees and employers." *American National Insurance,* supra at 402. An employer may also bargain to an impasse on mandatory subjects of bargaining and thereafter "lawfully implement proposals reasonably comprehended within those it offered before impasse [citation omitted]." *Telescope Casual Furniture, Inc.,* 326 NLRB 588 (1998); *Rochester Telephone Corp.,* 333 NLRB 30 (2001); *McClatchy Newspapers, Inc*., 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997); *Tampa Sheet Metal Co.,* 288 NLRB 322 (1988). An impasse may even be "brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process." *Charles D. Bonanno Linen Service v. NLRB,* 454 U.S. 404, 412 (1981). However, insisting to impasse on nonmandatory or permissive subjects of bargaining is, as counsel for the General Counsel correctly observes, a violation of Section 8(a)(5) of the Act. *Taft Broadcasting Co., WBRC-TV,* 274 NLRB 260 (1985); *Retlaw Broadcasting Co.,* 324 NLRB 138 (1997).

Respondent does not dispute that the right to deal directly with employees regarding their wages is a permissive subject of bargaining. The General Counsel, appropriately relying on *Retlaw Broadcasting Co.,* supra, asserts that the "unrestricted and indefinite right to direct deal with all unit employees" is a permissive subject of bargaining. However, the General Counsel inconsistently urges that the matter of above-scale compensation (permitted through the direct dealing provision of the expired contract) is a mandatory subject of collective bargaining. Essentially, the General Counsel argues that once above-

[28] On January 11, 2001, prior to the hearing, Respondent filed a written motion to strike the 8(a)(5) allegations and par. 12 of the complaint, which was denied on January 12, 2001. In its brief, Respondent requested reconsideration of its motion as to par. 12. In accordance with my conclusion herein, the request for reconsideration is denied.

scale wage rates are individually established through direct dealing, Respondent must observe the restrictions on unilateral changes of mandatory subjects of bargaining in altering those wage rates. The General Counsel, thus, distinguishes between the right to establish above-scale wages (a permissive subject) and the right to alter established above-scale wages (a mandatory subject, according to the General Counsel). The General Counsel cites no supporting authority for such a distinction. Like the instant matter, *Retlaw Broadcasting,* supra, involves PSCs in the media industry and establishes that proposals to allow an employer to negotiate directly with unit employees concerning wages constitute permissive subjects of bargaining. That is true, whether the right sought is limited or unlimited. See *Taft Broadcasting Co.*, above. The above-scale wages set through direct dealing with employees exist within the ambit of a permissive subject and are also permissive. Therefore, in whatever form Respondent posed its proposals regarding direct dealing, they were permissive subjects of bargaining.[29]

Although collective bargainers are free to propose the right to deal directly with employees, no party may insist to impasse on the inclusion of such a term in a contract. *Taft Broadcasting Co.,* supra; *Retlaw Broadcasting Co.,* supra. Once agreed to, permissive subjects of bargaining continue to exist essentially at the will of either party. Thus, although civil remedies may apply, parties to a contract may rescind any permissive term of the contract at any time without violating Section 8(a)(5) of the Act. *Chemical Workers Local 1 v. Pittsburgh Glass Co.,* 404 U.S. 157 (1971). The unilateral modification of a contract term is "a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining." Id. at 185; *Pall Biomedical Products Corp.,* 331 NLRB 1674 (2000); *Tampa Sheet Metal Co.,* supra. Thus, Respondent's alteration of employees' wages within parameters above contract scale constituted modification of permissive contract terms only and did not violate Section 8(a)(5) of the Act. The critical question in determining the existence of an 8(a)(5) violation herein is whether Respondent did, in fact, push its demand for the "unrestricted and indefinite right to direct deal with all unit employees" to impasse. I conclude it did not.

I note that both Respondent and the Union wanted direct dealing provisions in any contract reached: Respondent because it needed the flexibility to obtain "talent" at costs far above scale, and the Union because compensation at scale would have been intolerable to unit employees who either enjoyed or hoped to enjoy the financial fruit of their media successes. With both sides recognizing the other's need for the provision, the permissive subject of direct dealing became an effective economic weapon for both parties. The Union primed and fired its weapon first when it rescinded permission for Respondent to deal directly with new employees. After dodging artillery fire for a few months, Respondent discharged its own economic weaponry and refused to deal directly with all employees, stating its intention to reduce current employees to scale upon expiration of their PSCs or as of March 1 for employees without PSCs. There is nothing in this maneuvering alone to suggest any violation of the Act as Respondent was free under the Act to make changes unilaterally as to permissive subjects of bargaining even if it had been included in the expired contract and even if it resulted in a reduction of wages to the contractual scale. The Board is "mindful of the Supreme Court's admonition that it is not [the Board's] role 'to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of [its] assessment of that party's bargaining power.' *American Ship Building Co. v. NLRB*, 380 U.S. 300, 317 (1965)," quoted in *McClatchy Newspapers, Inc.,* supra at 1394. Where, as here, an employer utilizes an economic weapon in response to a union's economic weapon and in support of its lawful bargaining position, there is no violation of the Act. *Central Illinois Public Service Co.*, 326 NLRB 928 (1998).[30] The General Counsel argues that when, on December 8, 1997, the Union reinstated Respondent's right to deal directly with all employees for above-scale compensation and PSCs, Respondent was empowered to negotiate with employees for above-scale reimbursement but was restricted from unilaterally reducing employees' above-scale compensation "absent bargaining with the affected employees." The General Counsel cites no authority for his position, and it is not consonant with the direction of the Court in *American Ship Building,* supra. The General Counsel seems to suggest that the direct dealing provision of the expired contract created a collective-bargaining relationship among Respondent and its above-scale employees on which the regulatory requirements of the Act are attendant. There is no authority for such a concept. If Respondent is not obligated to bargain with the Union before making unilateral changes of a permissive subject of bargaining, it is certainly not required to bargain with its affected employees. The premise of the argument appears to be that employees should not be exposed to economic harm during strategic bargaining maneuvers. However, real or potential economic hardship to employees is not a touchstone of Board analyses of collective bargaining. In *American Ship Building Co. v. NLRB,* supra at 309, the Court noted that locking out employees in support of a legitimate bargaining position did not violate the Act, stating, "The lockout may well dissuade employees from adhering to the position which they initially adopted in the bargaining, but the right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage."

There is no evidence that Respondent insisted to impasse on its proposed right unrestrictedly and indefinitely to deal with unit employees. Long before Respondent made its proposal for such broad direct dealing, it had been seeking to establish impasse so that it might implement its proposals on mandatory subjects of bargaining. In doing so, there is no allegation, and no evidence, that it went beyond the scope of legitimate hard bargaining. Doyle acknowledged that significant differences on severance pay, overtime, and other issues separated the par-

[29] It is noted that Respondent was free to reduce employees' above-scale wages during the term of the contract. That Respondent did so in the case of PSCs after discussion or "negotiation" with the employee does not confer statutory bargaining rights on the employee or alter the permissive nature of the direct dealing.

[30] Rev. denied sub nom. *Electrical Workers Local 702 v. NLRB,* 215 F.3d 11 (D.C. Cir. 2000).

ties at the time Respondent made its broad direct dealing proposals. There is no evidence that had those issues been resolved, Respondent would have continued to press for the unlimited right to deal directly with employees. There is no evidence that Respondent's demand for unlimited direct dealing was a prerequisite or condition of agreement on the mandatory subjects at issue. In fact, Respondent's final implemented offer did not contain any such direct dealing provision, and the provision agreed to in the current contract does not provide for unlimited direct dealing. The General Counsel bears the burden of proof that "Respondent conditioned any agreement to a mandatory subject on acceptance of its [permissive subject] proposal." *Taft Broadcasting Co.,* supra at 262. The General Counsel has not met that burden. Indeed, inasmuch as Respondent was fully aware of the Union's desire to incorporate the right to deal directly in any contract reached, it had no reason to insist to impasse on that provision, and there is no evidence Respondent pushed to impasse for the broader proposal. Rather, the evidence suggests that Respondent used the permissive subject of direct dealing as an economic weapon to force agreement or impasse on mandatory subjects of bargaining. In doing this, Respondent did not violate Section 8(a)(5) of the Act. Accordingly, I find complaint allegations that Respondent insisted to impasse on a permissive subject of bargaining and thereafter unilaterally reduced unit employees' wages to the contractual minimum in violation of Section 8(a)(5) of the Act must fail.[31]

5. Alleged 8(a)(3) violations

The General Counsel contends that Respondent's reduction of Clement's and others' above-scale wages was inherently destructive of employees' Section 7 rights in violation of Section 8(a)(3) of the Act. The inherently destructive concept was discussed in *NLRB v. Great Dane Trailers,* 388 U.S. 26, 33 (1967), where the Court said:

> [I]f it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

The Board has held that an employer's use of otherwise lawful economic bargaining weapons will not, alone, support a violation of Section 8(a)(3). In *Harter Equipment, Inc.*, 280 NLRB 597 (1986),[32] the Board held that "absent specific proof of antiunion motivation, an employer does not violate Section 8(a)(3) and (1) by hiring temporary replacements in order to engage in business operations during an otherwise lawful lockout." In *Central Illinois Public Service Co.,* supra, the Board read the holdings in *American Ship Building,* supra, and *NLRB v. Brown Food Store,* 380 U.S. 278 (1965), as precluding inference of antiunion motivation "solely from the application of economic pressure during the bargaining dispute." Standing alone, Respondent's decision to reduce employees' wages to the contractual minimum is no more of an unlawful economic weapon deployment than is locking out employees. In employee lockout cases, the Supreme Court has found the impact of employer conduct on employee rights is comparatively slight, rather than inherently destructive and prima facie lawful. *American Ship Building Co.* and *Brown Food Store,* supra. In *Brown Food Store*, supra at 284, the Court pointed out that employers may legitimately stockpile inventories, readjust contract schedules, or transfer work from one plant to another, thereby blunting the effectiveness of a strike. Presumably, that would adversely economically affect striking employees. There is no authority to teach that the present situation should be viewed differently than the lockout cases. In either instance, employees may face economic privations as a result of the employer's use of a lawful economic weapon. However, the employees' right to bargain collectively is not affected, and there is no "natural tendency" severely to discourage union membership. See *Harter Equipment, Inc.,* supra at 598.

The General Counsel argues that the economic weapon used herein—reduction of above-scale compensation—was in support of an unlawful bargaining position and thus inherently discouraged union membership. I have found that Respondent did not engage in unlawful bargaining; therefore, this argument must fail.

The General Counsel further contends that because Clement was a strong union supporter and a high profile news anchor, Respondent ensured his salary would be the first one to be dropped. By dropping the salary of a high profile employee who was also a union supporter, the General Counsel argues, Respondent sent a message to all bargaining unit employees designed to chill union support and thereby engaged in conduct inherently destructive of employee rights. This argument is persuasive.

As already found, Respondent treated Clement differently than other employees similarly situated with regard to the renegotiation of his PSC. Respondent's reduction of Clement's salary was by simple definition "discriminatory." It is necessary to consider whether Respondent's discriminatory reduction of Clement's salary may reasonably be regarded as "inherently destructive of important employee rights"—in which case the Board may find an unfair labor practice despite employer justifications—or whether the effect of the discriminatory conduct is "comparatively slight,"—in which case Respondent may provide "legitimate and substantial business justifications," and the Board may not draw an inference of improper motive from the conduct itself. See *Great Dane Trailers,* supra.

[31] In light of this finding, I do not find it necessary to address Respondent's argument that the Union's bargaining conduct justified Respondent's tactics.

[32] Rev. denied 829 F.2d 458 (3d Cir. 1987).

The Supreme Court has found inherently destructive employer conduct in several cases. In *NLRB v. Erie Resistor Corp.,* 373 U.S. 221 (1963), the employer's grant of superseniority to replacement workers and returning strikers was considered inherently destructive of employee rights. In *Great Dane Trailers,* supra, the withholding of vacation benefits from employees who continued to strike was also inherently destructive. Finally, in *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983), more severe discipline meted to union leaders than nonunion leaders was found to be inherently destructive of employee rights. In each of those cases, the employer treated employees in a bargaining unit differently depending on the degree of their involvement in protected union activity. The Court found employer conduct to be inherently destructive where the employer differentiated among members of the bargaining unit based on their union activities. The Ninth Circuit has held that where "discriminatory conduct is directly related to protected activity . . . such conduct is inherently destructive and an inference of improper motive is warranted," *Kaiser Engineers v. NLRB*, 538 F.2d 1379, 1386 (9th Cir. 1976). The Board, however, has not limited the "inherently destructive" doctrine to situations in which employer conduct is directly and unambiguously aimed at protected activity. In *International Paper Co.,* 319 NLRB 1253 (1995), enfd. denied 115 F.3d 1045 (D.C. Cir. 1997), the Board set out four fundamental guiding principles for application of the doctrine of employer conduct inherently destructive of employee rights: First, conduct which directly and unambiguously penalizes or deters protected activity is inherently destructive; second, conduct that has far reaching effects as would hinder future bargaining and create visible and continuing obstacles to future exercise of employee rights is inherently destructive; third, conduct exhibiting hostility to the process of collective bargaining itself is inherently destructive; and fourth, conduct may be inherently destructive of employee rights if it discourages collective bargaining by making it seem a futility in the eyes of employees.

There is no explicit or implicit evidence that Clement was treated disparately because of his particular, individual union activity. He was a supportive union member, but not more so than many others were. However, in light of the circumstances surrounding Clement's PSC negotiations, it is not unreasonable to conclude that Clement was not merely a coincidental casualty of the bargaining struggle, but that because of his salary and status, he was singled out to be a high profile warning of the devastating strength of Respondent's economic armaments.

While Respondent is free to level its lawful economic weapons on all employees equally, no legal authority suggests it is free to select one employee as an example, thereby bringing considerable economic pressure on the Union while otherwise preserving its work force. Put another way, Respondent is not entitled to customize its economic weapon through disparate employee treatment in order to maximize pressure on the Union while minimizing harmful consequences to itself. As noted, Respondent ensured that other employees whose PSCs expired were permitted to sign new PSCs. Further, non-PSC employees were not scheduled to have their salaries reduced until March 1. For more than a full month, Clement alone demonstrated to employees the ramifications of the Union's bargaining holdout. Respondent was thereby able dramatically to warn employees of impending consequences while avoiding wholesale employee exodus. I find that sniping a selected target rather than generally discharging an economic weapon constitutes impermissible differentiation among members of the bargaining unit. The differentiation practiced here may not have been specifically intended to discourage Clement's individual support of the Union. Nevertheless, I conclude that Respondent meant to communicate to employees that their collective strength and security as union members was illusory since Respondent, by manipulation of PSC negotiations, could, with impunity, select one or another of its employees to sacrifice in furtherance of its bargaining demands, thus dissipating group protection. It is not unreasonable to conclude that Respondent's conduct might well "chill" union support. In determining a purpose to "chill," the Board has concluded that *Darlington Mfg. Co.,* 165 NLRB 1074 (1967), requires only "a finding of the foreseeability of the chilling effect rather than evidence of its actual occurrence." *George Lithograph Co.,* 204 NLRB 431 (1973). In fact, there is evidence that Respondent must have intended to promote employee disenchantment with the Union as Respondent encouraged Clement to sponsor union decertification. Respondent's actions thus fit within two of the fundamental guiding principles for distinguishing inherently destructive conduct set out in *International Paper Co.,* supra: They have far reaching effects as would hinder future bargaining and they discourage collective bargaining by making it seem a futile exercise to employees. Respondent's conduct in discriminatorily selecting Clement as its first PSC termination is, therefore, inherently destructive of important employee rights.

An employer's conduct that is inherently destructive of employee rights is a presumed unfair labor practice unless the employer can prove "legitimate and substantial business justifications" for its actions. *In re Pirelli Cable Corp.,* 131 NLRB 158 (2000); *Giddings & Lewis, Inc. v. NLRB*, 710 F. 2d 1280, 1285 (7th Cir. 1983). Respondent has failed to demonstrate that it had legitimate and substantial business justifications for arranging that Clement would be the first employee reduced to scale. Section 8(a)(3) of the Act makes it an unfair labor practice to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Since Respondent's discrimination against Clement could only have been designed to foster employee dissatisfaction with the Union, Respondent must have intended thereby to discourage membership in the Union. Accordingly, by discriminating against Clement in refusing to accord him the same PSC negotiation opportunities as given to other similarly situated employees, Respondent violated Section 8(a)(3) of the Act.[33]

The General Counsel argues that by its unlawful actions, Respondent effectively discharged Clement. Since Clement was not discharged but resigned his employment, it is necessary

[33] As to other employees without PSCs whose wages were reduced on March 1, there is no evidence that they were singled out for wage reduction or were anything but the victims of Respondent's lawful economic weaponry use. Therefore, there is no violation of the Act as to those employees.

to determine whether he was constructively discharged. "A constructive discharge is not a discharge at all but a quit which the Board treats as a discharge because of the circumstances which surround it." *Multimatic Products,* 288 NLRB 1279, 1348 (1988); *Intercon I (Zercom),* 333 NLRB 223 (2001). Here, Respondent deliberately made Clement's working conditions unbearable by its discriminatory wage cut, which conduct was designed unlawfully to discourage union support. See *Intercom I (Zercom)*, supra at fn. 3. While Respondent's intent may not have been to force Clement to resign rather than simply to discourage union support generally, it must have anticipated that consequence, and the conditions meted to Clement were imposed discriminatorily as comprehended by Section 8(a)(3) of the Act. Respondent has not shown that a valid business justification or explanation existed for the circumstances surrounding Clement's pay reduction or that the reduction would have occurred absent its desire to discourage union support. Therefore, Respondent has not met its *Wright Line*[34] burden. See *FiveCAP, Inc.,* 332 NLRB 943 (2000). Therefore, I conclude that in drastically and discriminatorily cutting his compensation, Respondent constructively discharged Clement.

CONCLUSIONS OF LAW

1. By soliciting employee Harry Clement to obtain employee resignations from the Union, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

2. By reducing employee Harry Clement's above-scale compensation on January 31, 1998, Respondent violated Section 8(a)(3) and (1) of the Act.

3. By causing Harry Clement to be constructively discharged, Respondent has violated Section 8(a)(3) and (1) of the Act.

4. By the above conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act in any other manner alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent having discriminatorily reduced the salary of and constructively discharged employee Harry Clement, it must offer him reinstatement to be effective at a time when he is not otherwise bound by the terms of a personal service contract with another employer and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

[34] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).